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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN TOLANO,

Defendant and Appellant.

B235153

(Los Angeles County Super. Ct.
No. VA118275)

APPEAL from a judgment of the Superior Court of Los Angeles County, Roger Ito, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner, Executive Director, and Ann Krausz, Attorney, under appointments by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Martin Tolano was convicted by jury of possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a). Defendant was sentenced to six years in state prison, consisting of the upper term of three years, which was doubled as a result of the trial court's finding that defendant had suffered a prior conviction under the three strikes law. Defendant was awarded custody credit for 207 days served and an additional 102 days of conduct credit.

Defendant raises only one issue in his timely appeal. Citing *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), defendant contends he is entitled as a matter of equal protection of the law to the increased conduct credits provided under the October 2011 amendment to Penal Code sections 2933 and 4019.¹ We hold that our Supreme Court's recent decision in *People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*) completely undermines defendant's argument. We therefore affirm the judgment.

FACTS

The facts are not in dispute for purposes of appeal and therefore are stated in summary form. On January 16, 2011, defendant was in possession of .19 grams of a substance containing a useable amount of heroin.

DISCUSSION

In briefs filed prior to the decision in *Brown, supra*, 54 Cal.4th 314, defendant contends the October 2011 amendment to sections 2933 and 4019 apply to his sentence under the equal protection analysis of *Kapperman, supra*, 11 Cal.3d 542. As a result, defendant argues he is entitled to 207 days of conduct credit, rather than the 102 days he was awarded, based on his 207 days of custody credits.

¹ All further statutory citations are to the Penal Code.

Defendant's commitment offense and arrest occurred on January 16, 2011. He was sentenced on August 3, 2011. At the time of his offense, defendant was entitled under former section 4019 to six days of credit for every four days served. Effective October 1, 2011, sections 4019 was amended to effectively provide one day of conduct credit for each day of custody credit in most situations. (§ 4019, subd. (f) ["a term of four days will be deemed to have been served for every two days spent in actual custody"].) The amendment providing for one-for-one credits applies only to crimes committed on or after October 1, 2011. (§ 4019, subd. (h).) As a matter of statutory construction, the amendment to section 4019 is expressly not retroactive, and defendant quite properly makes no contrary argument. (*Brown, supra*, 54 Cal.4th 314 at p. 322, fn. 11.)

Defendant's equal protection argument was rejected by our Supreme Court in *Brown, supra*, 54 Cal.4th 314. (*People v. Ellis* (2012) 207 Cal.App.4th 1546, 1551 (*Ellis*).) "Defendant and amicus curiae also contend the present case is controlled by . . . *Kapperman, supra*, 11 Cal.3d 542, in which this court concluded that equal protection required the retroactive application of an expressly prospective statute granting credit to felons for time served in local custody before sentencing and commitment to state prison. We disagree. Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing *conduct* credits are similarly situated." (*Brown, supra*, at p. 330; see *Ellis, supra*, at p. 1551.)

In light of the holding in *Brown*, as explained in *Ellis*, defendant's equal protection argument fails. The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.